

## **STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: ADMISSIBILITY OF DOCUMENTS PREPARED BY DEFENDANT IN JAIL**

Criminal Rule 15: The State is entitled to discover materials the defendant prepared while in jail; the physician-patient privilege does not apply.

The State of Arizona, by and through undersigned counsel, in response to the defendant's Motion in Limine, asks this Court to deny the motion for the reasons stated in the following Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **THE FACTS:**

On April 19, 1996 the defendant was discovered injured in the Maricopa County Jail, the result of a failed suicide attempt. Alongside the defendant, detention officers discovered numerous poems, notes addressed to various family members and friends, and a two-page document labeled "Mood Chart."

Because defendant has now alleged these documents were privileged, the State questioned Dr. Potts, a psychiatrist employed by the Maricopa County Jail Facilities, as to whether the defendant wrote the "Mood Chart" as part of his treatment. Dr. Potts responded he did not recall requesting the defendant to maintain a "Mood Chart."

#### **ARGUMENT:**

The defendant is not a novice in the prison system. He is aware that he has no right to privacy in his cell. The poems and notes addressed to family members and friends are not protected by any privilege under Arizona law, nor could the two-page document labeled "Mood Chart" be construed as a communication intended to be protected by the Doctor-Patient Privilege.

#### **THE LAW:**

In Arizona there are two Physician-Patient Privileges statutes, one for civil cases, A.R.S. § 12-2235, and one for criminal proceedings, A.R.S. § 13-4062(4). Arizona also has a confidential communication statute for psychologists, A.R.S. § 32-2085.

"The purpose of the physician-patient privilege is to insure that patients will receive the best medical treatment by encouraging full and frank disclosure of their medical history and symptoms to their doctors." *State v. Beaty*, 158 Ariz. 232, 239, 762 P.2d 519, 526 (1988), *cert. denied*, 491 U.S. 910 (1989). In order for the privilege to apply, four requirements must be met:

1. The patient must not consent to the testimony.
2. The witness must be a physician or surgeon.
3. The information was imparted to the physician while he was attending the defendant.
4. The information must be necessary to enable the physician to prescribe or act for the treatment of the defendant.

*State v. Beaty, id.*; *State v. Morales*, 170 Ariz. 360, 363, 824 P.2d 756, 759 (App. 1991).

In addition, "To be privileged, information must be acquired by the physician in an examination or consultation with the patient under circumstances in which it is intended that the communication be private and confidential." *Beaty, id.*, *quoting* M. Udall & J. Livermore, *Arizona Practice: Law Of Evidence* § 75 at 144 (2d ed. 1982).

The defendant's poems and notes to family members do not qualify for the physician-patient privilege because they do not relate to any medical treatment or examination. In addition, they were never imparted to Dr. Potts or even intended for him.

Evidence must be communicated to a doctor to be privileged. In *State v. Elmore*, 174 Ariz. 480, 851 P. 2d 105 (App. 1992), the defendant objected to the admission of evidence concerning his treatment at Sunburst Treatment Center, claiming this evidence was protected by the doctor-patient or psychologist-client privilege. The Court of Appeals rejected his argument and stated:

Neither [the doctor-patient nor psychologist-patient] privilege applies, however, because none of the evidence appellant objected to involved communications between appellant and a doctor or a psychologist. Therefore the trial court did not abuse its discretion by admitting the evidence.

*Id.* at 483, 851 P.2d at 108. In this case, the defendant did not communicate the poems, letters, or "mood charts" to any physician or psychologist, nor were they part of his therapy. Therefore, those materials are outside the scope of necessary information required to enable Dr. Potts or any other therapist to treat the defendant. *State v. Beaty*, 158 Ariz. 232, 240, 762 P.2d. 519, 527 (1985).

The defendant's reliance on A.R.S. § 36-509 is misplaced. That statute generally provides that all information and records obtained by a health care professional in the course of a person's mental health evaluation, examination, or treatment "shall be kept confidential and not as public records." The statute does not permit a person to block the presentation of evidence that he himself has created and never given to any health care professional.

In *State v. Apelt*, 176 Ariz. 349, 861 P.2d 634 (1993), defendant Apelt argued that the trial court erred by admitting at trial letters and notes written by the defendant and his codefendant. Apelt argued these documents were illegally seized from his jail cell and from his person. The Arizona Supreme Court relied on the United States

Supreme Court decision in *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S.Ct. 3194, 3202, 82 L.Ed.2d 393 (1984), which held that "the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells." The Court also relied on one of its own prior decisions, *State v. Moorman*, 154 Ariz. 578, 584, 744 P. 2d 679, 685 (1987). The Court concluded that the defendant had no Fourth Amendment claim. Although the guards seized the items pursuant to a search warrant, seizure of items from the jail cell did not require a warrant. *State v. Melendez*, 168 Ariz. 275, 812 P. 2d 1093 (Ariz. App. 1991). Apelt also argued that introducing his letters into evidence violated his right to due process and deprived him of a fair trial, but the Arizona Supreme Court rejected Apelt's argument.

In this case, not only was the seizure of the letters proper, the defendant was aware that these items could be discovered at any time. This clearly indicates the contents of the letters were never intended to be confidential. Therefore, the poems and notes addressed to family members are completely outside the scope of doctor/patient privilege.

The two-page "Mood Chart" was neither communicated to the Dr. Potts in confidence nor made during an examination, contrary to the provisions of A.R.S. § 36-509. Defendant's claim of privilege is further diminished by the fact a prison cell is not a setting for maintaining confidential material. None of the materials in this case are protected by any privilege and all of these materials should be admissible at trial.

**CONCLUSION:**

None of the challenged material here is protected by any privilege, and seizing the material did not violate any of the defendant's rights. Therefore, the State asks this Court to deny the defendant's motion in limine.